



U.S. Citizenship
and Immigration
Services

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JUN 10 2004

Date JUN 10 2004

FILE:

Office: SAN FRANCISCO, CALIFORNIA

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, San Francisco, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Philippines. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. The applicant is the beneficiary of an approved Petition for Alien Relative filed by his naturalized U.S. citizen spouse. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) in order to remain in the United States and reside with his U.S. citizen spouse and child.

The Acting District Director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Acting District Director's Decision* dated July 24, 2003.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

.....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record indicates that the applicant was admitted to the United States on June 9, 1996, on a transit visa. He remained longer than authorized and on November 15, 2000, he filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Resident. The record further reflects that an Authorization for Parole of an Alien into the United States (Form I-512) was issued to the applicant on November 23, 2001. The applicant departed the United States on an unknown date after the issuance of the Form I-512 and after a visit to the Philippines he was paroled into the United States. It was this departure that triggered his unlawful presence.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (Secretary)] as a period of stay for purposes of determining

bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until November 15, 2000, the date of his proper filing of the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

As stated above, section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, U.S. citizen or lawfully resident spouse or parent.

In the present case, the applicant must demonstrate extreme hardship to his U.S. citizen spouse.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(a)(9)(B)(v) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In his brief, counsel asserts that the Acting District Director erred in issuing an advance parole to the applicant based on any future inadmissibility consequences when he was granted advance parole. Counsel submits a November 26, 1997, memo from the Office of Programs regarding "Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days". The memo states in part that: "... Service officers generally should not grant advance parole to any alien who is known to have accrued more than 180 days of unlawful presence prior to filing the adjustment of status application under section 245(a) or 245(i) of the Act, unless it appears likely that the alien would, in the exercise of discretion, be likely to receive a waiver of inadmissibility when the adjustment of status application is adjudicated."

The memo counsel refers to does not preclude a Service officer issuing an advance parole to an individual who has accrued more than 180 days of unlawful presence prior to filing an adjustment of status application. The applicant in this case was warned of potential future inadmissibility. The applicant applied for and received advance parole in order to travel out of the country for a family emergency. The advance parole document, which was issued to the applicant, on November 23, 2001, included the following notification:

Notice to Applicant: Presentation of this authorization will permit you to: resume your application for adjustment of status upon your return to the United States. If your adjustment application is denied, you will be subject to removal proceedings under section 235(b)(1) or 240 of the Act. If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the processing of your application. If you are found inadmissible, you will need to qualify for waiver of inadmissibility in order for your adjustment of status to be approved.

Based on the above, it is concluded that the applicant was warned about his future inadmissibility.

On appeal, counsel further asserts that Citizen and Immigration Services (CIS) abused its discretion and failed to correctly assess emotional, financial, and psychological damage to the applicant's spouse and child. Counsel contends that the applicant has provided ample evidence of extreme hardship to his wife. In support of this assertion, counsel submitted a brief and a psychological evaluation on behalf of the applicant's spouse. The psychological evaluation states that Ms. [REDACTED] suffers from major depressive disorder, severe, without psychotic features, acute stress disorder, and anxiety disorder. Ms. [REDACTED] states that she often suffers from nightmares and headaches and that she worries about her husband being deported and the effect it would have on their child. The evaluation concluded that the applicant's deportation from the United States would likely have a devastating effect on each family member. The report was based on one interview with the [REDACTED] family and discusses general hardship that would be imposed on Ms. [REDACTED] if the applicant was to leave the country. The psychologist concludes with a recommendation that Ms. [REDACTED] obtain a psychiatric evaluation and treatment but does not mention if her condition can be treated in the Philippines if she decides to relocate with the applicant. Nor is there any indication that Ms. [REDACTED] followed the psychologist's recommendation.

Counsel asserts that the economic conditions in the Philippines are such that the applicant will be unable to find comparably paid employment and the couple's child will receive insufficient education and medical attention. The record does not establish that the applicant is the only individual who can provide care to the couple's child and does not establish that the applicant would be unable to obtain employment in the Philippines beyond generalizations regarding prevalent country conditions.

Ms. [REDACTED] states that she does not want to relocate to the Philippines because she will lose her job and medical insurance, her parents live in the United States and that the applicant is the main financial income of the family. The record indicates that Ms. [REDACTED] is gainfully employed with an annual salary above \$52,000 and thus would not be dependent on the applicant financially. The record also reflects that Ms. Bansil's job provides health coverage.

There are no laws that require Ms. [REDACTED] to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

As mentioned, section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(9)(B)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent. Congress specifically did not mention extreme hardship to a U.S. citizen or resident child. Therefore, hardship to applicant's child cannot be considered.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996). U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme

hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the documentation in the record, when considered in its totality reflects that the applicant has failed to show that her U.S. citizen spouse would suffer extreme hardship if she were removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.